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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12
13 **MARK AUSSIEKER**, individually and
14 on behalf of all others similarly situated,

15 *Plaintiff,*
16
17 *v.*

18 **OMID AGHAZADEH d/b/a**
19 **“GOLDEN CAPITAL HOLDINGS”**

20
21 *Defendant.*

22 Case No. 2:25-cv-00888-TLN-AC

23
24 **MEMORANDUM IN OPPOSITION TO**
25 **DEFENDANT’S MOTION TO STAY**
26 **DISCOVERY**

27
28 **INTRODUCTION**

29 As the Plaintiff’s opposition to the Defendant’s Motion to Dismiss makes clear, the
30 Plaintiff has plausibly alleged that he received telephone solicitations in violation of the TCPA
31 because the messages Plaintiff received offered the Defendant’s real estate services and were not
32 a pure offer to purchase real estate. Because the motion would be apt to be denied, and because a
33 stay would be unnecessary and severely prejudice the Plaintiff, it should be denied.

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35 **I. A Stay is Unnecessary and Would be Prejudicial**

36 Defendant’s sole argument in support of its motion to stay is that his motion to dismiss
37 may prevail. However, there is a mountain of caselaw that the Defendant’s text message
38 advertisements, which Defendant himself posted about on social media as marketing tactics to

1 make sales as part of a real estate contract negotiation service, were solicitations under the
 2 TCPA. The TCPA analysis for determining whether a communication constitutes a “solicitation”
 3 focuses primarily on the defendant’s purpose for initiating the communication. *See Abboud v.*
 4 *Circle K Stores Inc.*, No. 2:23-cv-01683, 2025 WL 307039, at *6 (D. Ariz. Jan. 27, 2025) (“At
 5 bottom, whether the text messages qualify as ‘telephone solicitations’ turns on Defendant’s
 6 purpose in causing the messages to be sent.”)

8 Importantly, the offering of contingent services for which no monetary outlay is required
 9 still constitutes a “solicitation” under the TCPA. *Cacho v. McCarthy & Kelly LLP*, 739 F. Supp.
 10 3d 195, 209 (S.D.N.Y. 2024). Here, Defendant has offered to represent the Plaintiff in the sale of
 11 a property, by providing the Plaintiff “options to sell it.” (Compl. ¶ 23). Those options included
 12 the offer of “real estate wholesaling,” which essentially consists of the Defendant acting as a
 13 middleman in “brokering a deal for the property and pocketing the difference.” (Compl. ¶ 27).
 14 This consists of including the Plaintiff to agree to sell a home and then connecting the Plaintiff to
 15 and selling that contract to an investor for a profit. (Compl. ¶ 33, 38). This is plainly providing a
 16 service under the TCPA. *Cacho*, 739 F. Supp. 3d 195, 209 (S.D.N.Y. 2024) (“Defendant’s offer
 17 to represent Plaintiff clearly qualifies as an offer of services. . . . As a result . . . the challenged
 18 calls allegedly sought to encourage *Plaintiff* to contract with Defendant and to direct a portion of
 19 a future right to payment to Defendant. While those funds would originate from a third party, the
 20 calls urged the relevant decisionmaker—namely, Plaintiff—to allocate those funds.”).
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22 Notably, that very activity falls within the express ambit of the services covered by CAL
 23 BUS. & PROF. CODE § 10131. (Compl. ¶ 28). The Code outlines a “real estate broker” as a
 24 “person who . . . does or negotiates to do one or more of the following acts for another or others,
 25 including one who “solicits prospective sellers or buyers of, solicits or obtains listings of, or
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1 negotiates the purchase, sale, or exchange of real property or a business opportunity” and one
2 who “[s]ells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real
3 property sales contract.” Importantly, California courts have interpreted the offering to help a
4 party sell a property via the sale of a sales contract to another investor to be activity done by real
5 estate brokers which requires a broker’s license. *See, e.g., Venturi & Co. LLC v. Pac. Malibu*
6 *Dev. Corp.*, 172 Cal. App. 4th 1417, 1421, 92 Cal. Rptr. 3d 123, 127 (Cal. C.A. 2nd Dist. Div. 8,
7 2009) (explaining that contract which provided for a “marketing strategy to secure financing”
8 and “mutually agreed upon financial advice and investment banking services” constituted an
9 unlawful unlicensed brokerage contract). Nor is the Defendant a mere “finder,” since the
10 Plaintiff has alleged that the Defendant is the one providing the Plaintiff a contract to sign, and
11 then selling the contract for the purchase of the house to a third party. *Tyrone v. Kelley*, 507 P.2d
12 65, 70 (Cal. 1973) (explaining that the only exception to the licensing requirement is a “finder,”
13 who may only bring the “parties together so that they may negotiate their own contract,” and
14 further explaining that if the finder “goes further and helps to conclude the transaction by taking
15 part in negotiating the details of the transaction, compromising or composing differences
16 between the parties, by way of example,” he is subject to the licensing requirements of the
17 Code).

21 That the Defendant is providing services here, namely, the negotiation, search for, and
22 subsequent sale of a real estate sales contract to a network of investors, is a service the Plaintiff
23 is being encouraged to invest in, rendering the solicitation a telephone solicitation under the
24 TCPA. *See Children’s Apparel Network Ltd. v. Twin City Fire Ins. Co.*, 2019 WL 3162199, at *4
25 (S.D.N.Y. June 26, 2019) (“[T]he plain meaning and common usage of the term ‘service,’ ...
26 includes professional services, such as legal representation and advice.”). Defendant’s offer to
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1 represent Plaintiff clearly qualifies as an offer of services and renders it a solicitation. Courts
2 have straightforwardly held that a person who is solicited to pay a portion of his ultimate sales
3 price to an agent in exchange for listing services has purchased a service. *See McMorrow v. Core*
4 *Properties, LLC*, 2023 WL 8697795, at *11 (E.D. Mo. Dec. 15, 2023) (concluding plaintiff
5 purchased real-estate sales services in the form of a lower sale price for his house); *see also*
6 *Anderson v. Catalina Structured Funding, Inc.*, 2021 WL 8315006, at *5 (W.D. Mich. Dec. 21,
7 2021) (explaining when defendant provided the service of converting the plaintiff's structured
8 settlement into a lump sum, that "just because the fees may be taken out of the lump sum
9 payment to the payee rather than itemized does not mean that no fees were charged in connection
10 with the transaction"), *report and recommendation adopted*, 2022 WL 3643733 (W.D. Mich.
11 Aug. 24, 2022). The same conclusion follows here where the services Plaintiff was solicited for
12 was necessarily sought by a reduction in price on the negotiated sales contract.

13 It is on this point that the Defendant's citation to *Coffey* is distinguishable. In that case,
14 the court held that a pure offer to purchase a home, without more, was insufficient as the
15 messages plainly encouraged the Plaintiff only "engage in future selling activity" and not at all
16 encourage the plaintiff to "engage in future purchasing activity." *Coffey v. Fast Easy Offer LLC*,
17 No. CV-24-02725-PHX-SPL, 2025 WL 1591302, at *4 (D. Ariz. June 5, 2025). In other words,
18 all the messages and business model in *Coffey* did was to offer to *buy* the Plaintiff's home in a
19 manner no different than an inquisitive neighbor calling to see if the house next door might be
20 for sale. As other courts have held, a *pure* offer to *buy* something *from a plaintiff* does not
21 constitute a telephone solicitation, for "telephone solicitations are calls intending to encourage a
22 purchase by the listener, not the caller. Calls asking to purchase the listener's labor, blood, or
23 other service are not telephone solicitations." *Orea v. Nielsen Audio, Inc.*, 2015 WL 1885936, at
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1 *3 (N.D. Cal. Apr. 24, 2015) (holding a survey call was not a solicitation, although it requires
2 expenditure of the recipient's labor and information); *see also Murphy v. DCI Biologicals*
3 *Orlando, LLC*, 2013 WL 6865772, at *10 (M.D. Fla. Dec. 31, 2013), aff'd, 797 F.3d 1302 (11th
4 Cir. 2015) (holding offer to obtain blood in exchange for payment was not a solicitation);
5 *Edelsberg v. Vroom, Inc.*, 2018 WL 1509135, at *5 (S.D. Fla. Mar. 27, 2018) (offer to buy a car);
6 *Friedman v. Torchmark Corp.*, 2013 WL 1629084, at *4 (S.D. Cal. Apr. 16, 2013) (encouraging
7 plaintiff to visit a free webinar offering a job).

9 But here, the Plaintiff has not pled that the Defendant merely purely offered to buy the
10 Plaintiff's home. Rather, at its core, Plaintiff alleges that the Defendant charges an effective fee
11 for its services by negotiating with the Plaintiff for a contract to sell their house at a reduced
12 price and then servicing that contract by shopping it around to other investors, who will agree to
13 buy the purchase contract for a certain amount or percentage payable to the Defendant. The
14 outcome for the Plaintiff and other consumers is effectively the same: the Plaintiff is simply
15 purchasing the services of a realtor, albeit in a different form: shopping out the potential sale of
16 the house to investors rather than the general public on the MLS, all in exchange for a
17 commission. Many other courts have seen through this façade and found similar conduct (or
18 allegations) to violate the TCPA: calls advertising brokerage services plainly violate the TCPA.
19 A real estate brokerage advertising its "real estate brokerage services" to unrepresented
20 consumers is a communication "[whose] sole purpose . . . is to allow NRT to pitch its brokerage
21 services to the called party," and is therefore, "made 'for the purpose of encouraging the
22 purchase' of NRT's brokerage services." *Chinitz v. NRT W., Inc.*, No. 18-cv-06100-NC, 2019
23 U.S. Dist. LEXIS 27134, at *6-7 (N.D. Cal. Feb. 20, 2019). Whether calls constitute
24 "telemarketing" should be approached "with a measure of common sense." *Chesbro v. Best Buy*
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1 *Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2013). The Defendant’s “argument sounds a little like a
2 real estate buyer’s agent who tells his or her client that the home sellers will pay the fees
3 associated with the buyer’s agent’s services, rather than the buyer. That is ridiculous, of course:
4 the buyer could offer to pay less for the house if the seller did not have to pay the buyer’s agent’s
5 fees.” *Anderson*, 2021 WL 8315006, at *5.

6 In short, the Defendant’s motion is likely to be denied.

7 Moreover, a stay-related delay would prejudice Plaintiff and other class members by
8 amplifying the risk that evidence will be lost or destroyed. *E.g., Saleh v. Crunch, Ltd. Liab. Co.*,
9 No. 17-62416-Civ-COKE/HUNT, 2018 U.S. Dist. LEXIS 36764, at *4-5 (S.D. Fla. Feb. 28,
10 2018) (“a stay would prolong this matter on the Court’s docket and could conceivably prejudice
11 Plaintiff by the fading memory of any witnesses”); *Lathrop v. Uber Techs., Inc.*, No. 14-CV-
12 05678-JST, 2016 WL 97511, at *4 (N.D. Cal. Jan. 8, 2016) (plaintiffs in putative class action
13 may “suffer prejudice from a stay because the case would extend for an indeterminate length of
14 time, increase the difficulty of reaching class members, and increase the risk that evidence will
15 dissipate”).

16 The risk to the putative class members’ interests is not merely hypothetical. Multiple
17 decisions in TCPA class action cases have turned on the destruction of records necessary to
18 identify class members. *E.g., Levitt v. Fax.com*, No. 05-949, 2007 WL 3169078, at *2 (D. Md.
19 May 25, 2007) (denying class certification in a TCPA case because “critical information regarding
20 the identity of those who received the facsimile transmissions” was not available); *Pasco v. Protus*
21 *IP Solutions, Inc.*, 826 F. Supp. 2d 825, 831 (D. Md. 2011) (granting the defendant summary
22 judgment for the substantially the same reason). As a result, courts regularly permit plaintiffs to
23 commence discovery prior to a Fed. R. Civ. P. 26(f) conference related to these issues implicating
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1 non-parties in TCPA cases. *See e.g. Cooley v. Freedom Forever LLC et. al.*, Civil Action No. 2:19-
 2 cv-562, ECF No. 37 (D. Nev. July 19, 2019); *Cooley v. First Data Merchant Services, LLC et. al.*,
 3 Civil Action No. 19-cv-1185, ECF No. 32 (N.D. Ga. July 8, 2019); *Abante Rooter and Plumbing,*
 4 *Inc. v. Birch Commc'ns, Inc.* Civil Action No. 15-cv-03562, Dkt. No. 32 (N.D. Ga. 2016); *Mey v.*
 5 *Interstate National Dealer Services, Inc., et al.*, Civil Action No. 14-cv-01846, Dkt. No. 23 (N.D.
 6 Ga. Aug. 19, 2014). There are also other prejudices not associated with calling records that the
 7 Plaintiff will face from a stay. *See Sanaah v. Howell*, 2009 Civil Action No. 08-cv-02117-REB-
 8 KLM, U.S. Dist. LEXIS 35260, *2 (D. Colo. Apr. 9, 2009) (“with the passage of time, the
 9 memories of the parties and other witnesses may fade, witnesses may relocate or become
 10 unavailable, or documents may become lost or inadvertently destroyed.”). Here, the Plaintiff is
 11 simply seeking to proceed in the ordinary course with discovery. In denying a motion to stay,
 12 another federal court considered this issue in a TCPA case:
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14 In addition, Orangetheory has not demonstrated irreparable injury; it notes
 15 only that it is potentially on the hook for substantial damages, given the
 16 putative nationwide class. Monetary damages, of course, do not by
 17 themselves constitute irreparable injury. Simon, on the other hand,
 18 persuasively argues that she would be injured by a stay, particularly because
 19 discovery has yet to commence, and evidence is at risk of being lost. This
 20 injury, which is both likely and irreparable, far outweighs the injury posed
 21 by a potential future judgment for money damages.

22 ...

23 In the meantime, it is clear that critical evidence, including [*22] records
 24 from any third parties that Orangetheory may have contracted with for its
 25 telephone marketing, may be lost or destroyed.

26 *Simon v. Ultimate Fitness Grp., LLC*, Case No. 19-cv-890, 2019 U.S. Dist. LEXIS 147676, at
 27 *18, 21-22 (S.D.N.Y. Aug. 19, 2019).

28 This Court should similarly hold.

1 Dated: June 25, 2025

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11 **CERTIFICATE OF SERVICE**

12 I certify that I filed the foregoing via ECF on the below date, which will automatically
13 send a copy to all parties of record on the case.

14 Dated: June 25, 2025

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